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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. 819.

ILLINOIS CENTRAL RAILROAD COMPANY,
a Corporation,
Petitioner,

v.

WESLEY C. KELLEY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT.

The summary statement of petitioner is deemed by respondent to be inaccurate and somewhat misleading, and respondent will, therefore, undertake to make a statement of his own.

Respondent, Wesley C. Kelley, as plaintiff, brought this suit against petitioner Railroad Company, as defendant, in the Circuit Court of the City of St. Louis, Missouri, to recover damages under the Federal Employers' Liability Act (April 22, 1908, c. 149, 35 Stat. 65, as amended; 45 USCA, §§ 51-60), for personal injuries sustained by him on September 17, 1941, while he was in the employ of petitioner as a section hand engaged in interstate commerce

and transportation, and engaged in the course and scope of his employment in repairing petitioner's interstate main line track. He was injured when violently thrown from a motor car on which he was riding when it was derailed as a result of being driven into collision with the trailer of another car on the same track, which was then stationary, but which had been moving in the same direction prior to its being stopped. The two motor cars were in the charge of, and being operated by, agents and servants of petitioner other than respondent.

The facts recited in the foregoing paragraph were alleged in respondent's petition which was filed on February 3, 1942 (R. 1-4), were admitted in petitioner's amended answer which was filed on December 2, 1942 (R. 4-5), were shown in evidence by respondent's undisputed oral testimony (R. 41-42) and were also contained in a stipulation of the parties read into evidence (R. 88-91). The petitioner Railroad Company makes no contention that such facts were insufficient to establish petitioner's liability for respondent's injury by reason of such injury having resulted from negligence on the part of petitioner as charged in respondent's petition.

By its amended answer (R. 4-9) petitioner pleaded, as an affirmative defense: that, on October 27, 1942, respondent made a compromise settlement of his claim through petitioner's claim agent, L. L. Heilig, and executed and delivered to petitioner a full and complete release, in consideration of the payment to respondent of the sum of $3,500, whereby respondent forever released and discharged petitioner from any and all claims, demands and causes of action on account of said injury; that payment of said sum of $3,500 was made by a valid draft for that amount executed and delivered to respondent by petitioner's said claim agent, and accepted by respondent; and that, as a further consideration and inducement to respondent to make the compromise settlement, petitioner

agreed in a writing, delivered to respondent coincident with the delivery of the release, to pay any attorneys' fees for which respondent had become obligated on account of his injury and suit; and that, also coincident with the execution and delivery of the release, respondent and petitioner, through its said claim agent, Heilig, executed a stipulation for the dismissal of this suit on account of respondent's injuries. The release was copied *in haec verba* in petitioner's said answer (R. 6-7), and a photostatic copy of it appears opposite page 94 of the printed record herein (R. 94).

In his reply executed under oath and filed on December 7, 1942 (R. 9-13), respondent denied the allegations of petitioner's said answer, and alleged: that, long prior to the date of the alleged compromise settlement of respondent's claim, respondent was represented in his claim by two attorneys who had brought this suit, and petitioner had been summoned and had answered in said suit through its attorneys; that, in order to circumvent the canons of ethics of the American Bar Association, making it unethical for a lawyer to deal directly with another party represented by counsel, and a rule of the Supreme Court of Missouri incorporating said canons as a rule of said Court, petitioner had its claim agent, Heilig, who was not a lawyer, attempt to negotiate a settlement and compromise of respondent's claim in the absence of his attorneys and without their knowledge or consent, but respondent refused to deal with petitioner unless at least one of his attorneys was present; and that, upon learning this latter fact, petitioner's claim agent, on October 27, 1942, tricked and induced respondent into going into the office of counsel for petitioner, by falsely representing that one of respondent's attorneys, Asa J. Wilbourn, would come to that office and be present at the time of the proposed negotiations for settlement. Respondent's reply then goes on to allege (R. 11-12):

"* * * that, while plaintiff was in said office on said occasion, the defendant produced the form of release referred to in defendant's answer herein, and various other papers, to be executed by plaintiff in connection with a proposed settlement of plaintiff's said claim and suit, and obtained plaintiff's signature to said release and other papers, and delivery thereof to defendant, *upon the condition* that said release and other papers would be of no force or effect unless plaintiff's said attorney of record, Asa J. Wilbourn, *approved* the aforesaid proposed settlement of plaintiff's said claim and suit; and that, upon the aforesaid *conditional signing and delivery* of said release and other papers by plaintiff, as aforesaid, defendant delivered to plaintiff a certain draft, payable to the order of plaintiff, in the sum of $3,500.00, *upon condition* that, if plaintiff's said attorney of record, Asa J. Wilbourn, did not approve the aforesaid proposed settlement of plaintiff's said claim and suit, said draft was to be of no force and effect.

"Further replying, plaintiff states that, as soon as was reasonably practicable thereafter, and on, to wit, the 28th day of October, 1942, plaintiff communicated with his said attorney of record, Asa J. Wilbourn, and sought the approval or disapproval by said Wilbourn of the aforesaid proposed settlement of plaintiff's said claim and suit; that plaintiff's said attorney of record, Asa J. Wilbourn, immediately and emphatically disapproved said proposed settlement of plaintiff's said suit and claim; and that, within a reasonable time thereafter, plaintiff, by registered mail, duly informed defendant that the proposed settlement of plaintiff's said claim and suit had been disapproved, and duly returned to defendant the draft hereinbefore mentioned and all other papers left with plaintiff in connection with the aforementioned proposed settlement of plaintiff's said claim and suit.

"* * * that plaintiff did not endorse said draft, or attempt to cash the same, or receive any benefit thereunder; and that, by reason of all the facts and circumstances aforesaid, the said release referred to in de-

fendant's amended answer herein was not executed or delivered by plaintiff, and is null, void and of no force or effect because wholly lacking in consideration, and *because the same never went into effect by reason of its having been signed and delivered by plaintiff upon a condition which has not occurred.*" (Emphasis supplied.)

Respondent's testimony at the trial fully supported the allegations of his reply as to the circumstances under which he went to the office of petitioner's counsel (R. 47-48, 66-67), and to the effect that his signing and delivery of the release, and his acceptance of the $3,500 draft, were conditioned upon the approval of the proposed settlement by his attorney, Mr. Wilbourn (R. 46-50, 63, 69, 70-71, 72, 73-74). Respondent's testimony further showed that he signed and delivered those documents very reluctantly, even upon that condition, and only after several hours in the office of petitioner's counsel (R. 63-64, 67, 79, 129), during which time he attempted to communicate with Mr. Wilbourn, but was unable to do so (R. 48-49). Respondent's testimony in these respects is ably epitomized in the opinion of the Supreme Court of Missouri (R. 181-182; 177 S. W. 2d, l. c. 437-438), and was fully corroborated by the testimony of his wife, who was at all times present (R. 79-80, 82).

The evidence showed without dispute—in fact, it was conceded—that both Mr. Wilbourn, and respondent's other attorney, Mr. Eagleton, emphatically disapproved the proposed settlement of respondent's claim immediately upon learning of it the day after respondent had been in the office of petitioner's counsel (R. 54, 63, 81, 86-87); that the draft for $3,500 was never endorsed or cashed (R. 52, 141); and that the draft and other documents delivered to respondent at the office of petitioner's counsel were returned to petitioner by respondent's counsel by registered mail as soon as possible after respondent's counsel learned of, and disapproved, the proposed settlement (R. 54-55, 57).

The testimony offered on behalf of petitioner contradicted that of respondent in many respects, and tended to show that the signing and delivery of the release by respondent were unconditional (R. 100-101, 120-121, 145). Petitioner's claim agent, Heilig, testified that, some eight months before he secured the release from respondent, he (Heilig) knew that respondent had employed attorneys to represent him in his claim (R. 109-110), and that they had filed suit thereon (R. 112); and that the respondent was the one who proposed the making of a settlement of his claim for $3,500 (R. 111-114) direct with Heilig and without the knowledge or consent of respondent's attorneys (R. 129). However, on cross-examination, Heilig testified that, about a week before he obtained the release from respondent, he (Heilig) had received from his superiors specific orders to effect a direct settlement with respondent, in the absence and without the knowledge of respondent's attorneys (R. 124), and that, at the time he (Heilig) took respondent to the office of petitioner's counsel for that purpose, respondent, upon finding that his attorney, Mr. Wilbourn, was not there, attempted to reach Mr. Wilbourn by telephone, but was unable to do so (R. 129-131).

Evidence was adduced by petitioner showing that respondent had a contract of employment with his attorneys whereby the attorneys were to receive 50 per cent of any amount recovered by respondent on account of his injuries (R. 64-65, 66, 91-93, 147-148).

The trial resulted in a verdict and judgment in favor of respondent and against petitioner in the sum of $45,000 (R. 13, 157) and petitioner duly appealed to the Supreme Court of Missouri (R. 157-177), where, on December 6, 1943, the judgment was affirmed upon condition that respondent enter a remittitur of $15,000 (R. 178, 192), which remittitur, reducing respondent's judgment to $30,000, was duly entered on December 13, 1943 (R. 193-194).

Opinions of the Courts Below.

There was no opinion of the trial court in the case here sought to be reviewed.

The opinion of the Supreme Court of the State of Missouri appears at pages 178-192, inclusive, of the printed transcript of the record herein, and is reported as *Kelley v. Illinois Central R. Co.*, 177 S. W. 2d 435. The case is not yet reported in the official Missouri Reports.

In its opinion, the Supreme Court of Missouri ruled, in substance and effect, that one of the essential elements of a binding and enforceable written contract is a delivery of the written instrument evidencing the contract; that a delivery on condition is not a complete delivery, and a contract delivered on condition is not effective, until the condition is fulfilled; that parol evidence is admissible to show conditions precedent, which relate to the delivery or taking effect of the instrument, for this is not an oral contradiction or variation of the written instrument, but goes to the very existence of the contract and tends to show that no valid or effective contract ever existed; and that, accordingly, the evidence in this case made an issue for the jury as to the existence and binding effect of the release set up in petitioner's answer as an affirmative defense to respondent's cause of action (R. 184-185; 177 S. W. 2d, l. c. 439-440).

The opinion of the Supreme Court of Missouri also passed upon some allegedly prejudicial statements made by respondent's counsel in his opening statement and in his argument to the jury (which we shall hereinafter consider in more detail in our argument herein), and held that such statements did not constitute prejudicial or reversible error (R. 186-190; 177 S. W. 2d, l. c. 440-442).

The opinion of the Supreme Court of Missouri also passed upon alleged excessiveness of the verdict and judgment, ruled that the verdict and judgment were excessive

by $15,000 when compared with verdicts and judgments in other cases involving similar injuries, and, accordingly, ordered the remittitur of $15,000 (R. 190-192; 177 S. W. 2d, l. c. 442-443).

Questions Presented.

The questions presented here are whether the Supreme Court of Missouri erred in its rulings respecting:

(1) The validity and effectiveness of the release set up by petitioner as an affirmative defense, and

(2) The nonprejudicial effect of the statements made by respondent's counsel in his opening statement and in his argument to the jury.

SUMMARY OF THE ARGUMENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

I.

There was no error in the ruling that a submissible issue was made for the jury as to whether the release pleaded as an affirmative defense was an existing and effective contract, because:

(a) If, as respondent's evidence showed, the release was signed and delivered by respondent upon condition that the proposed settlement of his claim and suit be approved by his attorney, Asa J. Wilbourn, the release never became effective, and constituted no defense to plaintiff's claim or action, because the proposed settlement was disapproved by Mr. Wilbourn.

13 Corpus Juris, p. 307, § 131;
17 Corpus Juris Secundum, p. 414, § 64;
Ware v. Allen, 128 U. S. 509, 9 S. Ct. 174, 32 L. Ed. 563;
Burke v. Dulaney, 153 U. S. 228, 14 S. Ct. 816, 38 L. Ed. 698;
Mankin v. Bartley, 4 Cir., 277 F. 960;
National Bank of Ky. v. Louisville Trust Co., 6 Cir., 69 F. 2d 97;
American Surety Co. of N. Y. v. Egan, 6 Cir., 62 F. 2d 223;
Meredith v. Brock, 322 Mo. 869, 17 S. W. 2d 345;
Pevesdorf v. Union Electric Co., 333 Mo. 1155, 64 S. W. 2d 939;
Stiebel v. Grossberg, 202 N. Y. 266, 95 N. E. 692;
Halloran v. Fischer, 126 Conn. 44, 9 A. 2d 290;
Carr v. Weiss, 215 Mass. 532, 102 N. E. 906;
Jordan v. Davis, 108 Ill. 336;
Kilcoin v. Ortell, 302 Ill. 531, 135 N. E. 16;
Handley v. Drum, 237 Ill. App. 587;
Tegtmeyer v. Nordlund, 259 Ill. App. 247.

(b) Parol evidence was admissible to show conditions precedent, which related to the delivery or taking effect of the release, for this was not an oral contradiction or variation of the instrument but went to the very existence of the contract and tended to show that no valid and effective contract ever existed.

32 Corpus Juris Secundum, p. 857, § 935;
Authorities cited under point I (a), supra.

(c) The language of the release to the effect that it "contains the entire understanding," related only to the subject matter of the instrument—particularly, the consideration for the release—and had nothing whatsoever to do with the matter of delivery *vel non* of the instrument.

II.

There was no prejudicial and reversible error in the opening statement or the argument made by respondent's counsel during the trial, and the Supreme Court of Missouri correctly so ruled, because:

(A) Technical errors, defects or exceptions which did not affect the substantial rights of the parties must be disregarded, and prejudicial error will not be preserved.

Act of Feb. 26, 1919, c. 48, 40 Stat. 1181, 28 U. S. C. A. 391;
Revised Statutes of Missouri 1939, § 1228;
Sebastian Bridge District v. Missouri Pacific R. Co., 8 Cir., 292 F. 345, 349;
Morgan v. Sun Oil Co., 5 Cir., 109 F. 2d 179, 181.

(B) Respondent's counsel had the right, in his opening statement to the jury, to state in good faith his claims as to the law and the available evidence upon the pleaded issues, and the trial court had a broad discretion in ruling upon that opening statement. There is nothing in the record in this case to show bad faith on the part of re-

spondent's counsel, or abuse of the trial court's discretion, in this connection. On the contrary, the evidence adduced was substantially what respondent's counsel stated that it would be, and any improper statements of counsel were prevented from being prejudicial by the rulings of the trial court.

Buck v. St. Louis Union Trust Co., 267 Mo. 644, 185 S. W. 208, 212;
F. L. Dittmeier Real Estate Co. v. Southern Surety Co. (Mo. Sup.), 289 S. W. 877, 888;
State ex rel. Kansas City Public Service Co. v. Shain, 345 Mo. 543, 134 S. W. 2d 58, 61;
Thompson v. St. Louis S. W. R. Co. (Mo. Sup.), 183 S. W. 631, 636;
Dees v. Skrainka Const. Co. (Mo. Sup.), 8 S. W. 2d 873, 878;
Ocean Accident & Guarantee Co. v. Penick & Ford, 8 Cir., 101 F. 2d 493, 500;
Graham v. United States, 231 U. S. 474, 34 S. Ct. 148, 151-152, 58 L. Ed. 319.

(C) The arguments of counsel to the jury not having been preserved in full, and only fragments of the argument of respondent's counsel being shown in the record, there is no way of determining that such argument was not invited and responsive to the whole record. To rule prejudicial the argument of respondent's counsel—that a statement made by one of petitioner's counsel was "phony" (R. 172), and which manifestly was made in response to an argument made by such one of petitioner's counsel—would be to convict the respondent's counsel of bad faith, and the trial court of error and abuse of discretion, by mere implication.

Morgan v. Sun Oil Co., 5 Cir., 109 F. 2d 179, 181;
London Guarantee & Acc. Co. v. Woefle, 8 Cir., 83 F. 2d 325, 344;
Chicago & N. W. R. Co. v. Kelly, 8 Cir., 74 F. 2d 31, 37;

Chicago & N. W. R. Co. v. Kelly, 8 Cir., 84 F. 2d 569, 573;

Bobos v. Krey Packing Co., 323 Mo. 244, 19 S. W. 2d 630, 633;

Cordray v. City of Brookfield (Mo. Sup.), 88 S. W. 2d 161, 165;

Marlow v. Nafziger Baking Co., 333 Mo. 790, 63 S. W. 2d 115, 120;

Wendler v. People's House Furnishing Co., 165 Mo. 527, 65 S. W. 737, 741;

Irons v. American Railway Express Co., 318 Mo. 318, 300 S. W. 283, 292;

Monsour v. Excelsior Tobacco Co. (Mo. Sup.), 144 S. W. 2d 62, 68.

(D) The mere fact that the Supreme Court of Missouri found the verdict and judgment to be excessive when compared with awards in cases involving similar injury, and ordered a remittitur, is not in the slightest degree indicative that the verdict was the result of misconduct, passion and prejudice on the part of the jury caused by allegedly improper remarks of respondent's counsel.

Union Pacific R. Co. v. Hadley, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751.

ARGUMENT.

I.

As we understand it, petitioner contends that the Missouri courts have improperly deprived it of its affirmative defense of release by ruling that an issue as to whether the written release was an existing and effective instrument could be made for the determination of the jury by parol evidence showing the instrument to have been delivered on condition, irrespective of the fact that the release contained language to the effect that it "contains the entire understanding." The Missouri courts indisputably so ruled, but, we submit, that ruling was entirely correct and proper.

(A) Effect of Delivery of Release Upon Condition.

The general rule governing the conditional delivery of a contract in writing is stated in 13 Corpus Juris, p. 307, § 131, and reiterated in 17 Corpus Juris Secundum, p. 414, § 64, as follows:

> "Of the execution of a contract in writing, delivery is ordinarily an essential element; and a delivery on condition is not a complete delivery until the condition is fulfilled."

This rule is firmly established in almost every American jurisdiction.

In *Ware v. Allen*, 128 U. S. 509, 9 S. Ct. 174, 32 L. Ed. 563, suit had been brought upon a promissory note for $10,000.00, and it was defended upon the ground that it was understood at the time of the signing and delivery of the paper to plaintiff that it was to be of no effect, unless the transaction was approved by one or both of the makers' attorneys, to the satisfaction of the makers of the note. One of such attorneys declined to give any opinion

or have anything to do with the transaction, while the other disapproved it emphatically. The makers of the paper promptly so advised the plaintiff. This Court, in this connection, said (128 U. S., l. c. 595-596):

> "We are of the opinion that this evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred, and that it is not a question of contradicting or varying a written instrument by parol testimony, but that *it is one of that class of cases, well recognized in the law, by which an instrument, whether delivered to a third party as an escrow or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or be ascertained thereafter.*" (Emphasis supplied.)

To like effect is the decision in *Burke v. Dulaney*, 153 U. S. 228, 14 S. Ct. 816, 38 L. Ed. 698, another suit upon a note involving conditional delivery.

In *National Bank of Kentucky v. Louisville Trust Co.*, 6 Cir., 69 F. 2d 97, 102, it was said:

> "It was long ago established that, notwithstanding the parties might have gone through the form of executing a formal written contract, yet if it also had been agreed, be it only by parol, that such contract was not to take effect until the happening of some other event, and such subsequent event did not happen, the written contract will not be enforced even though it had been delivered to the obligee at the time of execution. Ware v. Allen, 128 U. S. 590, 9 S. Ct. 174, 32 L. Ed. 563."

In *American Surety Co. of N. Y. v. Egan*, 6 Cir., 62 F. 2d 223, 225, it was said:

> "It has long been settled that parol evidence is admissible to show that an instrument, unconditional

on its face, was delivered conditionally or upon an understanding that it should become effective upon the performance of some act."

The general rule above quoted from Corpus Juris was quoted, approved and followed in *Meredith v. Brock*, 322 Mo. 869, 17 S. W. 2d 345, 351-352, wherein it was said:

"It is well settled that one of the essential elements of a binding and enforceable written contract is a delivery of the written instrument evidencing such contract; and another, and correlative, essential element of an enforceable written contract is an acceptance of its delivery by the party to whom, or for whose benefit, such delivery is made. It is said in 13 C. J. 307, 308: 'Of the execution of a contract in writing delivery is ordinarily an essential element; and a delivery on condition is not a complete delivery until the condition is fulfilled * * *.'

"The term 'delivery' has been variously defined by the juristic authorities. One of the most satisfactory definitions of that term is found in Black v. Shreve, 13 N. J. Eq. 455, 561, wherein the term is held to mean, in legal phraseology, 'the final absolute transfer to the grantee [or promisee] of a complete legal instrument sealed [or signed] by the grantor, covenantor or obligor.' And, in Western Union Telegraph Co. v. Locke, 107 Ind. 9, 13, 7 N. E. 579, the delivery of a document or written instrument is said to import 'a surrender or parting with possession for a permanent purpose.' Again, 'delivery' has been described as a composite act; an act in which both parties must join and the minds of both parties must concur. 18 C. J. 478; Kinne v. Ford, 52 Barb. (N. Y.) 194, 197." (Bracketed portion supplied.)

In *Jordan v. Davis*, 108 Ill. 336, 340-341, it was said:

"The delivery of a written contract is indispensable to its binding effect, and such delivery is not conclusively proved by showing the placing of the paper by

> the alleged contracting party in the hands of the other. Delivery is a question of intent, and it depends whether the parties at the time meant it to be a delivery to take effect presently."

In. *Kilcoin v. Ortell*, 302 Ill. 531, 135 N. E. 16, 18, it was said:

> "The rule that contemporaneous oral statements cannot be heard to alter the terms of a written instrument presupposes execution and delivery of the writing with intent to bind the parties by its terms. * * * A delivery on condition is not a complete delivery, until the condition is fulfilled." (Authorities cited are omitted.)

In *Handley v. Drum*, 237 Ill. App. 587, 590, and again in *Tegtmeyer v. Nordlund*, 259 Ill. App. 247, 251-252, both of which cases were actions upon notes defended upon the ground of conditional delivery, the law is stated as follows:

> "It is a fundamental part of the law of contracts, to which there are very few exceptions, that a party to a written contract may not contradict the terms of that contract by parol. But it is equally well established that such a party may show that the contract claimed to exist was in fact never fully executed—that although it was signed by him, he never delivered it or that there was merely a conditional delivery and the condition has failed. In so doing, the written terms of the contract are not varied by parol but the showing made is merely to the effect that the contract never was completely executed."

That the foregoing principles relating to delivery of written contracts upon parol conditions are applicable in full force to releases, is clear from the authorities.

So, in *Mankin v. Bartley*, 4 Cir., 277 F. 960, a motion to quash an execution was filed in a personal injury suit,

upon the ground that the plaintiff had, during the pendency of an appeal from a judgment in his favor in the case, settled his case and executed and delivered to defendant a release of the judgment under seal. The motion was defended by plaintiff upon the ground that the release was delivered upon the express condition that the release and settlement should be approved by his attorneys, who had no knowledge thereof until afterwards, and, who, when they learned of it, strongly disapproved. The trial court denied the motion to quash the execution, and the Circuit Court of Appeals for the Fourth Circuit, in affirming this ruling said (l. c. 961-962):

> "* * * it is believed to be the settled rule of law, in Virginia as well as in other jurisdictions, that a contract under seal may be delivered on condition, and that parol evidence is admissible to show failure of compliance with the condition. * * * Whether or not the agreement signed by Bartley [i. e., the release under seal signed by the plaintiff] was delivered on the condition stated by him, which concededly had not been met, was a question of fact for the trial court to determine." (Bracketed portion supplied.)

In *Carr v. Weiss*, 215 Mass. 532, 102 N. E. 906, an action for damages was defended upon a release under seal allegedly given by plaintiff. At the trial, the defendant had requested, among others, an instruction that the only issue as to the release was whether it had been signed, and the Supreme Court of Massachusetts, in holding that this instrument was properly refused, said (102 N. E., l. c. 907):

> "If the release had been signed, but not delivered, it would not have been a bar."

In *Stiebel v. Grossberg*, 202 N. Y. 266, 95 N. E. 692, which was a suit upon a note defended upon the ground

that plaintiff had given defendant a release, the New York Court of Appeals said (95 N. E., l. c. 694):

> "A release, however, must be delivered in order to become effective. The delivery is a separate, independent act from that of executing [signing?] it." (Bracketed portion supplied.)

and after ruling that a release could be delivered conditionally, like any other writing, the Court there went on to say (95 N. E., l. c. 695):

> "The act of executing [signing?] releases is separate and distinct from acts of delivery. The delivery has to be shown independent of the instrument; and, while parol evidence is incompetent for the purpose of changing or explaining the meaning of the written instrument, we incline to the view that oral evidence may be given for the purpose of showing whether the delivery of the instrument was intended to be absolute or conditional." (Bracketed portion supplied.)

In *Halloran v. Fischer*, 126 Conn. 44, 9 A. 2d 290, plaintiff's action for rent was defended by defendant upon a release which plaintiff had signed and left with defendant's attorney, to be delivered to the defendant upon his payment of the consideration named therein—which defendant never paid. The Connecticut court, concerning this defense, tersely said (9 A. 2d, l. c. 293):

> "The claim that the release discharged the indebtedness is answered by the fact that it was delivered * * * upon a condition never fulfilled. The release did not become effective until the condition had been performed * * *."

(B) Parol Evidence Is Admissible and Sufficient to Establish Conditional Delivery.

Although many of the decisions just above discussed clearly show that parol evidence is competent and sufficient to establish that a delivery of a written instrument was conditional, let us direct attention to 32 Corpus Juris Secundum, p. 875, § 935, where the headnote reads:

> "In general, *parol evidence is admissible to show conditions precedent, which relate to the existence of a valid contract,* but is not admissible to show conditions subsequent, which provide for the nullification or modification of an existing contract." (Emphasis supplied.)

and in the body of the text there it is said:

> "* * * parol evidence is admissible to show conditions precedent, which relate to the delivery or taking effect of the instrument, as that it shall only become effective on certain conditions or contingencies, for *this is not an oral contradiction or variation of the written instrument but goes to the very existence of the contract and tends to show that no valid and effective contract ever existed;* * * *." (Emphasis supplied.)

(C) Language of Release Here Involved Does Not Alter the General Principles Applicable.

Petitioner here, while evidently recognizing every principle and rule of law heretofore discussed in this argument, has taken the position that the particular release here involved does not come within them because it contains the sentence—which is generally found in releases—that:

> "The payment of said sum [$3,500.00] is the only consideration for this release, *which contains the entire understanding.*" (Emphasis and bracketed portion supplied.)

The petitioner's contention is that the emphasized words in this sentence conclusively establish that the entire understanding of the parties is contained in the release, and that, therefore, parol evidence that the release was delivered on condition would have the effect of altering, varying or contradicting those very words in the instrument.* We believe that it readily can be demonstrated that this contention is fallacious, and that these particular words do not have the effect ascribed to them by petitioner.

In the first place, petitioner's contention erroneously assumes that the release here involved was an existing, effective instrument, and thereby assumes the very matter in issue. If the release was not an existing, effective instrument, the language in it saying that it "contains the entire understanding" cannot be given effect. In the light of respondent's denial of its execution, under oath in his reply, the burden was upon petitioner to establish the execution—i. e., both the signing and the complete delivery—of the instrument which it had pleaded by way of affirmative defense. The admitted facts that respondent had signed the instrument and put it in petitioner's possession did not establish complete execution of the instrument because:

> "* * * delivery is not conclusively proved by showing the placing of the paper by the alleged contracting party in the hands of the other. Delivery is a question of intent, and it depends whether the parties at the time meant it to be a delivery to take effect presently." (*Jordan v. Davis*, 108 Ill. 336, 340-341.)

Thus, parol evidence was not only admissible and sufficient, but was necessary, to show the intent with which respond-

* Let us here say that respondent fully recognizes the rule that parol evidence is not admissible, competent or sufficient to vary, alter or contradict the terms of a written instrument relative to its subject matter. As we view them, all of the authorities relied upon by petitioner do no more than announce that rule, and, accordingly, will not undertake any discussion of them.

ent put the instrument in petitioner's possession—i. e., whether the delivery was conditional or unconditional. Such evidence was not for the purpose of varying, altering or contradicting the terms of the instrument, but for the purpose of showing whether or not the instrument ever came into existence and effect. All of the authorities hereinbefore cited and relied upon by us at least inferentially so hold, and many of them specifically so hold.

In the second place, petitioner's contention erroneously assumes that the language in the release, saying that it "contains the entire understanding," relates to the matter of delivery vel non of the instrument. *The release here involved says nothing whatsoever about its delivery, or the time or circumstances under which it should become effective.* Even a most casual reading of the context of the instrument will demonstrate that the phrase of it so strongly relied on by petitioner relates and is limited to the understanding with respect to *the consideration for the release*, and has nothing whatsoever to do with any matter respecting *the delivery of the instrument.* The language immediately preceding that phrase, the balance of the language preceding the sentence which includes that phrase, and the sentence following that phrase, deal solely and only with *the consideration* for the release.

Parol evidence that the release was delivered upon a condition precedent—i. e., upon condition that the proposed settlement of respondent's claim and suit be approved by his attorney, Mr. Wilbourn—did not, and could not, have the effect of varying, altering or contradicting the terms of the release respecting the consideration for it. Respondent did not, and does not, attempt to vary, alter or contradict any of the terms or provisions of that instrument, the context of it, or the consideration for it, but he does assert and insist that it was never completely executed, and never became an existing and effective instrument, because it was delivered upon a condition which was never fulfilled.

The question in this case was, and is, not whether the terms of the release can be varied, altered or contradicted, but whether, as respondent's evidence showed, the instrument was delivered upon a condition that the proposed settlement of his claim and suit be approved by one of his attorneys, Mr. Wilbourn. If petitioner's evidence had, like that of respondent, shown that the release was delivered upon such condition, there could be no doubt in any mind that the release never became an existing and effective instrument, no matter what the language of the release might have been. The circumstance that petitioner's evidence in this connection was contradictory to that of respondent, and tended to show that the delivery of the release was unconditional, did no more than to create and present an issue of fact for the determination of the jury. That determination was that the instrument was delivered upon a condition precedent which concededly never was fulfilled, so that the release never went into effect as a binding instrument.

It is, we believe, quite clear that the rulings of the Missouri courts respecting petitioner's pleaded defense of release were entirely correct and proper.

II.

(A) Nonprejudicial Error Is to Be Disregarded.

Petitioner also seeks review of this case because of alleged error by reason of certain statements made by counsel for respondent in his opening statement to the jury and in his argument to the jury. Before considering the details in this connection, let us point out that it is provided by the Act of February 26, 1919, c. 48, 40 Stat. 1181 (28 USCA, § 391), that:

> "On the hearing of any appeal, certiorari, writ of error or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an ex-

amination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

A similar statute exists in Missouri, where the case at bar was tried. (See: Revised Statutes of Missouri 1939, § 1228.)

Under these and similar statutes, it is universally held that errors not affecting the substantial rights of a party in a case must be disregarded, and that prejudicial error will not be presumed. As to the application of these principles in cases involving alleged prejudicial statements or argument of counsel, see *Sebastian Bridge District v. Missouri Pacific R. Co.*, 8 Cir., 292 F. 345, 349, and *Morgan v. Sun Oil Co.*, 5 Cir., 109 F. 2d 179, 181.

(B) As to Error in the Opening Statement of Respondent's Counsel.

Petitioner makes several charges of misconduct on the part of respondent's counsel during his opening statement of the case.

The first of these incidents occurred when, in telling the jury that the evidence would show that, after this suit had been instituted, the petitioner's claim agent began paying visits to respondent's home, respondent's counsel referred to the fact that the ethics of the Bar and the rules of the Supreme Court of Missouri prevented lawyers from going directly to a person represented by another lawyer and attempting to negotiate with him a settlement, and then went on to say, over the objection of petitioner (R. 20):

"* * * I think the evidence will show you gentlemen—we expect to show you that for that reason that an attorney who would do that would be subject to discipline; that they had a man who is not an attorney, Heilig, who is not admitted to the Bar—they had

him go out to see this man, because not being a member of the Bar he could go ahead and do the job, so they thought, without being disciplined, that is to say, without being thrown out of the Bar Association or something of that kind."

At the time counsel made this reference to the matter of ethics and the rule of the Supreme Court of Missouri, the pleadings in this case presented a live issue in that regard, because respondent's reply had alleged (R. 9-10) that petitioner, although represented by counsel in the case and knowing that plaintiff was also represented by counsel therein, as a part of a plan to receive a release and discharge of respondent's claim and suit without knowledge of his attorneys, had sought to circumvent the canons and rules by having one of its claim agents, Heilig, who was not a lawyer and not subject to disciplinary action under such canons and rules, effect a settlement of respondent's claim and suit directly with respondent.* With that live issue in the case, neither the trial court nor respondent's counsel could anticipate what evidence might be adduced in that connection. Counsel in their opening statements to juries are authorized to state in good faith their claims as to the law and the facts so far as the same are necessary to enable the jury to understand the case, and will not be deemed to have committed prejudicial error in the absence of bad faith, the determination of the good faith of counsel being within the discretion of the trial court (*Buck v. St. Louis Union Trust Co.*, 267 Mo. 644, 185 S. W. 208, 212; *F. L. Dittmeier Real Estate Co. v. Southern Surety Co.* [Mo. Sup.], 289 S. W. 877, 888; *State ex rel. Kansas City Public Service Co. v. Shain*, 345 Mo. 543, 134 S. W. 2d 58, 61; *Thompson v. St. Louis Southwestern R. Co.* [Mo. Sup.], 183 S. W. 631, 636; *Dees v.*

* That there was such a plan, is manifest from the evidence that, about a week before he saw respondent to propose a "direct settlement," Heilig had received from his superiors specific orders to effect a direct settlement with respondent (R. 124).

Skrainka Constr. Co. [Mo. Sup.], 8 S. W. 2d 873, 878). Both the trial court and the Supreme Court of Missouri ruled that, in the instance now under consideration, the statements of respondent's counsel amounted to no more than what the evidence actually showed respecting the conduct of petitioner and its claim agent (R. 187; 177 S. W. 2d, l. c. 440-441).

Another incident in the opening statement of respondent's counsel, which is complained of by petitioner here, occurred when he referred to a Mrs. Artz as a "stool pigeon" for the Railroad (R. 22-23). According to Webster's New International Dictionary, 2d Ed., Unabridged, the term "stool pigeon" means "A person used as a decoy for others." The fact is that the evidence tended strongly to show that Mrs. Artz was just that. She was the wife of one of petitioner's bridge foreman (R. 26), who lived in a town some three miles from respondent (R. 44). Her husband also had been injured, and was in the hospital at the same time respondent was, and they became acquainted there (R. 44). After respondent left the hospital, Mrs. Artz called at his home on several occasions (R. 44). She and her husband had "repeatedly" discussed with petitioner's claim agent, Heilig, respondent's claim and suit against petitioner, and had told the claim agent that they believed respondent would want to settle his claim "direct," and that they would let the claim agent know about that when it occurred (R. 125). Petitioner's claim agent had seen Mr. and Mrs. Artz earlier on the very day that he had first discussed with respondent such a "direct settlement" (R. 126), and at that time the claim agent had in mind that perhaps they would have some information for him about respondent (R. 125). It is highly significant, in this connection, that Mrs. Artz was in the court room at the time respondent's counsel made his reference to her, she having been brought by petitioner from her home in Illinois to St. Louis for the trial (R. 127), but she

did not remain throughout the trial, and was not offered as a witness in the case. Certainly, respondent's counsel had good reason to believe, and in good faith did believe, that the evidence would show that Mrs. Artz was a decoy being used by petitioner for its own ends in connection with securing a so-called "direct settlement" of respondent's claim, and his statement to that effect was not in the least degree improper or erroneous. The Supreme Court of Missouri, in passing upon this matter, said that it was unable to perceive how it could have prejudiced petitioner (R. 188; 177 S. W. 2d, l. c. 441).

Another incident complained of by petitioner was that which occurred when respondent's counsel, in the course of his opening statement, said (R. 24):

> "He [Heilig] was in his hunting clothes; he was hunting ducks or something that had come into season, and he was out after ducks with a gun and out after Kelley with a pen.
>
> Mr. Gentry: I object to that statement as highly prejudicial.
>
> The Court: Sustained as to that last.
>
> Mr. Gentry: Ask the Court to tell the jury to disregard it.
>
> The Court: Disregard that last statement." (Bracketed portion supplied.)

Merely reading the record respecting this incident demonstrates that it furnishes no ground for review. Petitioner's objection to the statement was promptly sustained, and its motion that the jury be instructed to disregard the statement, was, likewise, promptly sustained. Petitioner's counsel was evidently fully satisfied that any harm from the incident had been overcome by the trial court's rulings—as it was. There is, simply, nothing for review respecting this incident because it is axiomatic that:

"Absent an adverse ruling and exception thereto, there is nothing before us for review" (*Osby v. Tarlton*, 336 Mo. 1140, 85 S. W. 2d 27, 31).

See, also, *Ocean Accident & Indemnity Co. v. Penick & Ford*, 8 Cir., 101 F. 2d 493, 500 [17-21], and *Graham v. United States*, 231 U. S. 474, 34 S. Ct. 148, 151-152, 58 L. Ed. 319.

Another incident, now complained of by petitioner for the first time, was a reference in the opening statement of respondent's counsel to the effect that the testimony would show that petitioner's claim agent, in attempting to get respondent to settle his suit, told respondent that he had better not go ahead with the suit because the Illinois Central was big and powerful and would scatter the witnesses so that respondent wouldn't get any place (R. 21). The evidence clearly shows that there was some discussion between respondent and petitioner's claim agent about the scattering of witnesses (R. 122-123), and the facts that the claim agent first categorically denied, and then conceded, that such a discussion took place, clearly indicate that respondent's counsel was acting in good faith when he made the statement which he did make in those connections. Furthermore, the fact that there was no objection made to counsel's statement precludes any prejudice to petitioner therefrom (*Ocean Accident & Indemnity Co. v. Penick & Ford, supra.*)

(C) As to Error in the Argument of Respondent's Counsel to the Jury.

Petitioner also contends for reversible error in connection with the argument to the jury, during the course of which respondent's counsel said (R. 156):

"* * * In his phony argument that the General Attorney [Mr. Freels] made—came down here in his

pompous dignity—he said the only reason he got into it—he's too good for us—the only reason he got into this thing was that his own conscience shuddered when he thought of the contract. He wasn't going to take part. When did he learn of the 50 per cent contract? He wasn't going to take part in it, he said. That's a phony statement because his own claim agent says he learned of the 50 per cent contract the night he tried to perpetrate the crime.

Mr. Gentry: If your Honor please, I object to that statement about perpetrating a crime.

The Court: It's sustained.

Mr. Gentry: Ask the Court to tell the jury to disregard it.

The Court: Disregard that last statement." (Bracketed portion supplied.)

The Supreme Court of Missouri, in ruling this incident to not constitute error prejudicial to petitioner, noted that the full arguments of counsel were not preserved in the record; that the objection made went only to the statement about petitioner's claim agent, Heilig, having "perpetrated a crime," and that the trial court promptly and emphatically sustained the objection to, and instructed the jury to disregard, such statement (R. 188-190; 177 S. W. 2d, l. c. 442). These matters preclude this incident from constituting error prejudicial to petitioner.

It is manifest that this argument was made in response to, and was invited by, argument made by Mr. Freels, petitioner's general attorney, who is of counsel in this case, although petitioner, for reasons best known to it, did not include Mr. Freels' argument in the printed record herein. The doctrines applicable under those circumstances are stated in *London Guarantee & Accident Co. v. Woelfle,* 8 Cir., 83 F. 2d 325, as follows:

"Counsel for an appellant who has been injured by improper argument to the jury should not ordinarily

> be permitted to take advantage of errors which he has invited or provoked * * *" (l. c. 343),

and, further:

> "* * * to secure from this court, as a matter of right, a reversal of a judgment because of improper remarks of counsel in an argument made to a jury, the bill of exceptions must contain all arguments in full * * *" (l. c. 344).

All of the authorities cited under point II, B, of our summary of the argument herein are to this effect, and the basis for these principles was tersely stated in *Wendler v. Peoples House Furnishing Co.*, 165 Mo. 527, 65 S. W. 731, 747, as follows:

> "The trial court having heard all the argument, is in a much better position to know whether an improper influence has been exerted, than an appellate court can possibly be, with only a fragment of the speech quoted."

It is manifest that the word "crime" was used by respondent's counsel, not in its technical legal sense, but in its colloquial sense as meaning "something reprehensible or disgraceful" (see: Webster's New International Dictionary, 2d Ed., Unabridged), and it is unlikely—in fact, it is inconceivable—that a jury of reasonably intelligent persons could interpret its use otherwise. However, in any event, petitioner's objection to the use of the term was promptly sustained, and upon petitioner's motion the jury was promptly instructed to disregard the statement made. The trial court thereby clearly and emphatically disapproved the argument of, and in effect rebuked, respondent's counsel, so that the error, if any, was promptly and effectively cured and petitioner could not have been prejudiced thereby. Any other holding would, by mere implica-

tion or presumption, convict respondent's counsel of bad faith, and the trial court of an abuse of its large discretion in permitting or restraining arguments.

(D) Excessive Verdict Not Demonstrative of Prejudicial Misconduct of Counsel.

In attempting to demonstrate that the statements and argument of respondent's counsel complained of by petitioner were prejudicial to it, petitioner points to the fact that the Supreme Court of Missouri found respondent's verdict and judgment to be excessive (R. 192; 177 S. W. 2d, l. c. 443), and assumes that an excessive verdict necessarily is the result of misconduct, passion and prejudice on the part of the jury. The attempted demonstration, however, fails completely.

An examination of the opinion of the Supreme Court of Missouri establishes that that Court ruled the respondent's verdict and judgment to be excessive because it exceeded the awards for similar injury in other cases, and because that Court is committed to a doctrine that there should be a reasonable uniformity in that regard (R. 190-192; 177 S. W. 2d, l. c. 442-443). In a similar situation, in *Union Pacific R. Co. v. Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751, this Court held that the requiring of a remittitur was not demonstrative of misconduct on the part of the jury, saying (38 S. Ct., l. c. 319):

> "The Court had the right to require a remittitur if it thought, as naturally it did, that the verdict was too high. Beyond the question of attributing misconduct to the jury, we are not concerned to inquire whether its reasons were right or wrong."

So, here, the fact that the Supreme Court of Missouri required a remittitur from respondent's verdict and judgment, when considered in the light of the reason for that

requirement, is not in the slightest degree demonstrative that the verdict was the result of misconduct, passion and prejudice on the part of the jury caused by allegedly improper remarks of respondent's counsel. Furthermore, the Supreme Court of Missouri specifically held that there was no conduct on the part of respondent's counsel which was prejudicial to petitioner.

The foregoing clearly distinguishes the instant case from *Minneapolis, St. P. & S. S. M. R. Co. v. Moquin,* 283 U. S. 520, 51 S. Ct. 501, 75 L. Ed. 1243, so strongly relied upon by petitioner. In the Moquin case, the Supreme Court of Minnesota clearly and unequivocally ruled that the verdict was "excessive because of passion and prejudice" on the part of the jury—the direct opposite of the ruling of the Supreme Court of Missouri in this case—and this Court there held no more than that a remittitur could not cure the error in a verdict *obtained by passion and prejudice,* because it would be mere speculation to attempt to calculate the extent of the wrong inflicted thereby.

The decision in *New York Central R. Co. v. Johnson,* 279 U. S. 310, 49 S. Ct. 300, 73 L. Ed. 706, so strongly relied upon by petitioner, also is distinguishable from the case at bar, because in that case there was a most aggravated case of misconduct on the part of a plaintiff's counsel in the use of bitter, vituperative and passionate language, and of unfair comment, in many, if not in all, instances without supporting evidence. There simply is no such situation in the case at bar.

CONCLUSION.

In conclusion, we most respectfully submit that there was, and is, no error in the opinion and decision of the Supreme Court of Missouri in this case; that the verdict and judgment in this case are manifestly for the right

party, and, as reduced by remittitur in the court below, are reasonable in amount; that the issuance of a writ of certiorari to review that opinion and decision could serve no useful purpose; and that the petitioner for writ of certiorari should, accordingly, be denied.

Respectfully submitted,

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ASA J. WILBOURN,
Of Counsel.